IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs at Jackson June 6, 2006

STATE OF TENNESSEE v. MICHAEL EUGENE WILKERSON

Direct Appeal from the Circuit Court for Warren County
No. F-9856 Larry B. Stanley, Jr., Judge

No. M2005-02132-CCA-R3-CD - Filed July 28, 2006

The defendant, Michael Eugene Wilkerson, pled guilty to the offense of escape, a Class E felony. See Tenn. Code Ann. § 39-16-605(b)(2) (2003). The trial court imposed a Range II, four-year sentence to be served consecutively to a sentence of fifty-seven years for three prior drug possession offenses. See Tenn. Code Ann. § 39-16-605(c). In this appeal, the defendant asserts that his sentence is excessive. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

L. Scott Grissom, Assistant Public Defender, for the appellant, Michael Eugene Wilkerson.

Paul G. Summers, Attorney General & Reporter; David H. Findley, Assistant Attorney General; Dale Potter, District Attorney General; and Larry Bryant, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

On February 4, 2004, the defendant, Michael Eugene Wilkerson, was convicted of three felony drug offenses. After the jury returned its verdicts, the defendant, who was serving his prior lengthy sentence, simply left the courtroom. He was not apprehended until six months later.

On July 11, 2005, the defendant, a Range II offender, entered a plea of guilty to the charge of escape, a Class E Felony. As advised at the guilty plea submission hearing, the "Range would be from two to four years. There is no agreement on sentence." On August 10, 2005, the defendant was sentenced to four years of incarceration to be served consecutively to his prior sentence of fifty-seven

years.[1] On appeal, the defendant asserts that his four-year sentence is excessive. Specifically, he argues that the trial court failed to follow the sentencing guideline of Tennessee Code Annotated section 40-35-103(4): "The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(4) (2003). The state contends that the trial court properly sentenced the defendant within the range because of the defendant's extensive criminal history.

When there is a challenge to the length, range, or manner of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Reform Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a Class E felony conviction, the presumptive sentence is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum, but still within the range. Id. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Id. § 40-35-210(e). The sentence should then be reduced within the range by any weight assigned to the mitigating factors present. Id. The weight to be assigned to the appropriate enhancement and mitigating factors falls within the sound discretion of the trial court so long as that court complies with the purposes and principles of the 1989 Sentencing Act and its findings are supported by the record. State v. Boggs, 932 S.W.2d 467, 475-76 (Tenn. Crim. App. 1996). If the trial court's findings of fact are adequately supported by the record, this court may not modify the sentence even if it would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

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[1] The Compiler's Notes to Tennessee Code Annotated section 40-35-114 (Supp. 2005) provide that "[o]ffenses committed prior to June 7, 2005, shall be governed by prior law, which shall apply in all respects." The offense at issue was committed on February 4, 2004, and sentence was imposed on August 10, 2005. The prior law of 2003, therefore, applies.

A Range II sentence for escape, a Class E felony, is two to four years. Tenn. Code Ann. § 40-35-112(b)(5) (2003). In sentencing the defendant, the trial court reviewed the presentence report and made reference to the sentencing guidelines and circumstances surrounding the plea. The trial court then imposed a four-year sentence based on the defendant's previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range. See id. § 40-35-114(2) (2003); see also id. §§ -114(15); -210(b)(5) (mandating trial court's consideration of enhancement factor for felony committed while incarcerated for felony conviction). The trial court found no mitigating factors. The defendant does not challenge the trial court's findings as to the enhancement and mitigating factors. He contends, however, that the trial court did not impose the least severe measure necessary to achieve the purposes for which he was sentenced. See id. § 40-35-103(4). The judge did observe that because of the seriousness of the offense, he believed "that confinement is necessary to establish the severity of the offense and is particularly suited to provide an effective deterrent to others who are likely to escape." See id. § 40-35-103(1)(B). Additionally, the trial court observed that "the escape was committed out of the courtroom after the defendant was convicted of several felonies, did not return voluntarily, and . . . was combative with the officers that were trying to arrest him." Under these circumstances, it is our view that the trial court did not err by ordering service of the maximum sentence.

Accordingly, the judgment of the trial court is affirmed.

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GARY R. WADE, PRESIDING JUDGE